IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 78-6899

ROBERT FRANKLIN GODFREY,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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I N D E X

TABLE OF AUTHORITIES

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QUESTIONS PRESENTED

1.

Is the Supreme Court of Georgia's appellate review of Petitioner's death sentence in conformity with its statutory obligation under Georgia law?

2.

May Petitioner challenge the composition of the grand jury that indicted him after he has failed to comply with state law regarding the timeliness of such challenges?

3.

Was it error to fail to charge on a lesser degree of murder where the evidence did not support such an instruction?

4.

Did the placing into evidence of photographs of the murder scene amount to a violation of Petitioner's right to a fair trial?

5.

Were the trial court's instructions during the penalty phase of Petitioner's trial sufficient to give the jurors sufficient guidance in terms of what constitutes a mitigating circumstance?

6.

Is the failure of a trial judge to charge exactly as requested of constitutional significance when the court's charge adequately embodied what Petitioner sought to have charged?

7.

Is the reading of an excerpt from an appellate decision to the trial judge in the presence of the jury a Due Process violation?

8.

Do matters presented in a petition for certiorari for the first time provide a basis for review?

STATEMENT OF THE CASE

Robert Franklin Godfrey, hereinafter referred to as the Petitioner, was indicted by a Polk County, Georgia grand jury for the September 20, 1977, murders of Mrs. Chessie C. Wilkerson [Petitioner's mother-in-law] and Mrs. Mildred Godfrey [Petitioner's estranged wife], and for an aggravated assault of Tracey Godfrey [Petitioner's daughter]. Following a jury trial, Petitioner was found guilty on all three counts. Petitioner received the death penalty for each of the two murder convictions and ten years for aggravated assault. Petitioner's convictions were later affirmed on appeal by the Supreme Court of Georgia. Godfrey v. State, 243 Ga. 302, 253 S.E.2d 710 (1978).

STATEMENT OF FACTS

Approximately two weeks before the murders, Petitioner on September 5, 1977, was seen threatening his wife, Mildred Godfrey, with a pocketknife. Petitioner and his wife had been arguing; and Petitioner had locked himself and his wife in the bathroom. The Godfrey's eleven-year-old daughter, Tracey, had gone to the nearby home of her married sister, Cathy Venable, for help. Mrs. Venable, along with Petitioner's brother, Billy Godfrey, Petitioner's nephew, Dennis Newby, entered Petitioner's home about the same time. Petitioner had obviously been drinking. Mrs. Godfrey told Petitioner she wanted to leave him. Petitioner then pulled out a pocketknife and told his wife he would cut her if she left him.

Mrs. Godfrey and Tracey moved out following the incident on September 5, and eventually moved into the trailer of Mrs. Godfrey's mother, Chessie Wilkerson, which was located several yards down the road. On September 6, Mrs. Godfrey showed her older daughter, Cathy, a pair of torn slacks and

underpants which Petitioner had cut off her the previous day. Mrs. Venable testified that following this separation, Petitioner had told her that he would accept a divorce.

Charles E. Hunt, a Justice of the Peace, stated that on September 5, he issued a warrant to Mildred Godfrey on Petitioner for aggravaged assault.[1/]

Elizabeth Newton, a nurse at Northwest Regional Hospital where Petitioner was employed as a male nurse, testified that on the morning of September 20, Petitioner told her he was getting a divorce. Petitioner said that it would all be over on the twenty-first.

On the evening of September 20, Tracey Godfrey was playing Rook with her mother and grandmother in Mrs. Wilkerson's trailer. Tracey heard a gunshot and saw her mother's head droop down. The grandmother screamed and told Tracey to get help. Tracey ran out the door, but Petitioner hit her in the head with the barrel of his gun. Tracey heard two more shots as she ran to Cathy Venable's home.

Tracey told Cathy Venable, and Dennis Newby's wife, Jackie, that Petitioner had shot her mother and hit her with a gun. Tracey had a laceration on the top of her head which was treated later at a hospital. Following the shooting, Petitioner sat outside in a yard chair near the trailer.

The county jail jailer, Carl Rice, received a call that evening from Petitioner. Petitioner told Rice that he had blown his wife's and mother-in-law's heads off and

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1/ Ga. Laws 1968, pp. 1249, 1280, as amended, Ga. Laws 1976, p. 543; Ga. Code Ann. § 26-1302.

asked to have the sheriff come for him.

Polk County policeman, Seals Minshew, arrived at the trailer about 8:35 p.m. Petitioner, who was sitting in a chair under a tree, told Minshew that there was no need to go to the trailer because "they're dead, I killed them." Minshew testified that Petitioner then offered to show him the weapon and directed him to the branches of an apple tree where the gun was resting. Minshew recovered a rifle-shotgun with an empty chamber. Petitioner was then arrested and advised of his rights.

Petitioner after being placed in a patrol car told Sheriff Seals Swafford that everything was taken care of, and that it was all over. At the police station, Petitioner told Patrolman James McLendon, Jr., that he had committed "a hideous crime" and that he had thought about it for eight years and would do it again.

One spent shell was found under the kitchen table in the trailer; one spent 20 guage shell was found in the trailer's carport; three live shells were found by the fence outside. Mildred Godfrey was found lying on her back with a hole in her forehead the size of a silver dollar. A hole was in the screen of a window facing the kitchen area. A spray of shots was scattered throughout the kitchen, and blood was dripping from the ceiling.

Mrs. Wilkerson was lying face down; the top part of her head was missing. Less than two feet from her head were parts of her skull and her brain. A few feet further away were more skull portions.

Jackie Newby, Elizabeth Newton, Carl Rice, and Officer Minshew testified that they believed Petitioner was sane and could distinguish right from wrong.

Dr. Robert A. Farrell performed external examinations of the two victims. Mildred Godfrey had a wound 3 1/2 to 4 inches wide in her forehead. Mrs. Wilkerson showed loss of a considerable amount of bone and soft tissue, skin and hair above and behind the right ear. Both women died from a gunshot wound to the head with resulting brain damage.

The defense offered the testimony of a psychiatrist, Petitioner, and two employees of the hospital where Petitioner was employed. Mrs. Dean Lebkicher, Director of Nursing at Northwest Regional Hospital, and Dr. Joseph Liang, Chief of Surgery at the same hospital, testified that Petitioner was a good worker and was dependable in his job.

Dr. William S. Davis, a psychiatrist, who had formerly treated Petitioner for alcohol abuse and depression testified for Petitioner. Dr. Davis examined Petitioner in February, 1978, under a court order. According to Dr. Davis, Petitioner was so upset on September 20, after his wife refused to consider any reconciliation with him, that he suffered a dissociative attack, causing him to forget all events relating to the shootings. Dr. Davis explained that Petitioner might have known right from wrong while in this state, but was unable to control his actions to prevent doing wrong. Dr. Davis said that Petitioner did not recall the events after being injected with Amytal.

Petitioner testified in his own behalf, recounting that his wife had him committed in 1950, 1966 and 1971 for drinking problems. Petitioner admitted that he had argued with his wife on September 5, but he claimed he could not recall threatening her with a knife. Petitioner testified that he had asked his wife three times during their separation when she would be coming back home, but she refused to consider it.

Petitioner's version of the events of September 20, 1977, was that on that date his mother-in-law called him to tell him his wife would call later. Mildred Godfrey later called Petitioner and told him she wanted all the proceeds from the sale of their house. Petitioner disagreed with this request, and his wife said she would call later. When Mrs. Godfrey later called, they argued again, and Petitioner's wife told him that the divorce would come up in court on the 22nd and that things would be settled then. According to Petitioner, he remembered hanging up the phone and his next recollection was waking up in the county jail on September 21. On cross-examination, Petitioner claimed he had never hit his wife with his fists, although he admitted he had slapped her.

The State called two witnesses in rebuttal. Dr. Robert Wildman, a clinical psychologist and Dr. Carl Smith, a psychiatrist both from Central State Hospital, Milledgeville, Georgia.[2/] Both men had examined and evaluated Petitioner under court order in February, 1978. Petitioner, it should be noted, had no history of psychosis or insanity, had no organic brain damage and exhibited no abnormal behavior. Dr. Wildman testified that one test revealed that either Petitioner was being uncooperative in the testing procedure or was trying to appear more disturbed than he was. Dr. Smith stated that a person will not necessarily tell the truth after injected with Amytal. Both Dr. Wildman and

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2/ Central State Hospital is the State hospital in Georgia where most individuals accused of a crime are sent for a psychiatric evaluation after they have filed a motion for psychiatric examination.

Dr. Smith testified that they believed that Petitioner had been able to distinguish right from wrong on September 20.

REASONS FOR NOT GRANTING THE WRIT

A. THE SUPREME COURT OF GEORGIA HAS NOT ABANDONED ITS APPELLATE REVIEW PROCESS WHICH THIS COURT EARLIER APPROVED, NOR HAS THE SUPREME COURT OF GEORGIA PERMITTED ONE OF THE STATUTORY AGGRAVATING CIRCUMSTANCES UPON WHICH THE PETITIONER WAS SENTENCED TO DEATH TO BECOME A "CATCHALL."

For the first time the Petitioner contends that the statutory aggravating circumstance upon which the trial jurors imposed the death penalty is void because there was only a partial finding of this statutory aggravating circumstance. Since matters raised for the first time on a petition for a writ of certiorari may not be providently reviewed, Stembridge v. Georgia, 343 U.S. 541 (1952), this aspect of this contention should be denied.

The Petitioner states that the seventh aggravating circumstance, namely the offense of murder was outrageously and wantonly vile, horrible and inhumane in that it involved a torture and depravity of mind on the part of the defendant or an aggravated battery to the victim, is unconstitutional in that it has not been narrowly applied by the Suprem Court of Georgia, and as such is a catchall statutory aggravating circumstance.

Respondent submits that the germane issue in this matter is whether the Petitioner's sentence to death under the statutory aggravating circumstance is warranted by the evidence prior to any consideration being given to whether or not the Supreme Court of Georgia has not limited the application of this statutory aggravating circumstance. Based upon the statement of facts which is in the first portion of this brief, it cannot be said that under the circumstances of this case (the facts are so horrifying) that the murder was not outrageously and wantonly vile, horrible

The cases in which this statutory aggravating circumstance has been considered by the Georgia Supreme Court have been carefully reviewed and there are no cases in which the Supreme Court of Georgia has permitted this seventh statutory aggravating circumstance to become a general receptacle for upholding the death penalty. On the basis of the facts in this case the evidence was so clear and convincing that there was no necessity or a requirement that the jurors be informed as to what constituted torture or depravity of mind, since the evidence clearly established all of the requirements as contained in the seventh statutory aggravating circumstance. The facts in this case do not lead to the conclusion that the jurors were given unbridled discretion, since the facts were so wantonly vile that they almost defy description.

Lastly, the Supreme Court of Georgia has not abandoned its appellate role in considering similar cases in determining "whether the sentence to death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Ga. Code Ann. § 27-2537(c)(3).

Furthermore, the appendix of cases considered by the Supreme Court of Georgia in carrying out its appellate statutory review function clearly demonstrates that in the six years since the revised death penalty was invoked in Georgia that they are considering cases of like circumstances wherein the death penalty for a similar statutory aggravating circumstance has been imposed. The conclusory allegations made by the Petitioner simply fail to establish that the Supreme Court of Georgia is not carrying out the review function which this Court earlier reviewed in Gregg v. Georgia, 428 U.S. 153 (1976), a procedure which was created and established by the General Assembly of Georgia.

The Petitioner's contentions surrounding the appellate review process in Georgia fail to demonstrate that certiorari in regard to the Petitioner's case is warranted.

B. UNDER GEORGIA LAW A CHALLENGE TO THE COMPOSITION OF THE GRAND JURY IS WAIVED UNLESS OBJECTED TO IN A TIMELY MANNER.

Under Georgia law a challenge to the composition of the grand jury may not be entertained by the trial court unless it is made prior to the return of an indictment, or defense counsel has shown that he has discovered an alleged error in the composition of the grand jury prior to the time an indictment was returned. Tennon v. Ricketts, 574 F.2d 1243 (5th Cir. 1978). See also, Stewart v. Ricketts, 451 F.Supp. 911 (M.D. Ga. 1978). Petitioner's attorneys were appointed prior to Petitioner's indictment. At the time of Petitioner's indictment he was not without the services of an attorney. Neither is there any showing that Petitioner did not have reason to believe that an indictment would be returned against him.

Accordingly, the failure to comply with the State procedural requirement precludes the challenge to the grand jury in this instance. See, Francis v. Henderson, 425 U.S. 1708 (1976); Dennis v. Hopper, 548 F.2d 589 (5th Cir. 1977); Dumont v. Estelle, 513 F.2d 793 (5th Cir. 1975), rehng. den., 532 F.2d 1375 (5th Cir. 1976).

For this reason alone the petition for certiorari should be denied.

C. WHERE THE DEFENSE IS INSANITY, AN INSTRUCTION ON VOLUNTARY MANSLAUGHTER IS NOT REQUIRED.

Petitioner argues that he is entitled to a new trial because the trial court failed to instruct the jury on a lesser degree of murder in Georgia, that being voluntary manslaughter.[3/] It will be recalled that the testimony presented on behalf of both the State and the Petitioner did not require an instruction on voluntary manslaughter, and as such no charge was required. See, Belton v. United States, 382 F.2d 150 (9th Cir. 1967). More importantly however, the Petitioner put forth the defense of insanity which is a defense that says basically that while I did it I am not legally responsible for my act. Under those circumstances a defense on insanity is not required. See, Chance v. Garrison, 537 F.2d 1212 (4th Cir. 1976); United States ex rel. Victor v. Weage, 330 F.Supp. 802 (D.C. N.J. 1971). Neither was there any evidence to show that the Petitioner's actions under Georgia law resulted from a "serious provocation" by his wife which would have caused him at that time to have killed this individual and her mother.

Accordingly, the lack of an instruction on voluntary manslaughter is not of constitutional proportions, and for this reason the petition for writ of certiorari should be denied.

3/ Ga. Laws 1968, pp. 1249, 1276; Ga. Code Ann. § 26-1102.

D. THE INTRODUCTION INTO EVIDENCE OF CERTAIN PHOTOGRAPHS DOES NOT RISE TO CONSTITUTIONAL DIMENSIONS.

The admissibility of photographs in a murder case, particularly where those photographs may be unpleasant,rests with the sound discretion of the trial judge. See, United States v. Shoemaker, 542 F.2d 561 (10th Cir. 1976), cert. den., 429 U.S.1004 (1976). Generally speaking the admissibility of photographs does not rise to constitutional dimensions. Talbot v. Nelson, 390 F.2d 801 (9th Cir. 1968), cert. den., 393 U.S. 868 (1968). While the photographs in issue may be gruesome they are not inadmissible for that reason alone. United States v. Hoog, 504 F.2d 45 (8thCir. 1974), cert. den., 420 U.S. 961 (1975). Petitioner has failed to show that the photographs of the two people he murdered were so inflammatory or gruesome that their prejudicial effect outweighed their probative value. United States v. Hoog, supra.

The use of photographs of murder victims, regardless of how gruesome they may be, becomes extremely relevant when the state is seeking the death penalty, since they bear directly on the question as to whether the accused's acts fall within one of the statutory aggravating circumstances contained in the Georgia death penalty statute which the State may be putting forth at a later portion of the trial. In this case the photographs depicting the bodies of the two murder victims were both relevant and material, and their admission into evidence was not for the purposes of inflaming the minds and passions of the jury, nor did their introduction into evidence correspondingly cause the jury to impose the death penalty on Petitioner. These photographs were relevant to aid the jury in depicting the crime scene and in order to provide a more meaningful manner in which to apply the evidence to the case, and thus were admitted to assist the court and jury in better understandin the case. Even though Petitioner may have admitted that he injured certain people, this does not preclude their admissibility into evidence to show the actual dismemberment which may have occurred at the Petitioner's hands. United States v. Morton, 493 F.2d 30 (5th Cir. 1974).

For this reason the petition for writ of certiorari should be denied.

E. THE TRIAL COURT'S INSTRUCTIONS DURING THE SENTENCING PHASE OF THE TRIAL DO NOT SUFFER FROM ANY CONSTITUTIONAL DEFICIENCY AS URGED BY THE PETITIONER.

Petitioner contends that the sentencing instructions were defective in that the Court did not spell out the fact that the jurors were to consider the particular characteristics of the accused. This Court has long stated that instructions should be viewed as a whole as they will not be judged in artificial isolation. Cupp v. Naughten, 414 U.S. 141 (1973). The Georgia statute unlike the statute in Woodson v. North Carolina, 428 U.S. 280 (1976), and in Lockett v. Ohio, 438 U.S. 586 (1978), does not suffer from the constitutional deficiencies of having a jury impose the death penalty without considering mitigating circumstances, or limiting the mitigating circumstances. To the contrary, in Georgia the trial court fully informs the jurors that they may consider any mitigating factors, the decision as to what constitutes a mitigating factor or circumstance being left to the jurors. The Supreme Court of Georgia has made it clear that the trial court does not have to spell out what constitutes a mitigating circumstance, since the jurors are free in their own discretion to make that decision. See, Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978); Spivey v. State, 241 Ga. 477, 246 S.E.2d 288 (1978); Thomas v. State, 240 Ga. 393, 242 S.E.2d 1 (1978). Sub judice, the jurors were given a full opportunity to consider mitigating circumstances which would include their consideration on any aspects of the Petitioner's character and record that they so desired.

The Petitioner also complains about the fact that the mitigating circumstances were not sufficiently defined or that examples of mitigating circumstances were not provided. As noted above, the Supreme Court of Georgia has held that it is not necessary for the trial court to specify or single out for the jurors what might be considered as a mitigating circumstance, since to do so might place a limitation on the jurors' discretion as to what they could consider as a mitigating circumstance. If the Court were to spell out what the mitigating circumstances were in a particular case, then the petitioner would come back and state that the jurors had been unnecessarily limited to those mitigating circumstances, stating that there may have been others and giving examples of those. Clearly, the better practice, and the practice in Georgia, is for the Court to inform the jurors that they may consider mitigating circumstances, and to define mitigating circumstances as being those circumstances which do not constitute justification or excuse for the crime but which may be considered as extenuating or reducing the moral culpability or blame on the accused. The trial court's instruction on mitigation in this instance was clearly sufficient, and since the term mitigating circumstance was defined, no further elaboration was required because the word mitigating is a common term within a juror's understanding. See, United States v. Beasley, 519 F.2d 233 (5th Cir. 1975), rehng. den., 522 F.2d 1280 (5th Cir. 1976).

F. PETITIONER'S RIGHT TO A FAIR TRIAL WAS NOT ABRIDGED WHEN THE TRIAL COURT FAILED TO GIVE A CHARGE EXACTLY AS REQUESTED BY THE PETITIONER WHEN THE COURT'S CHARGE AS A WHOLE ADEQUATELY COVERED THE PRINCIPLES EMBODIED IN THE PETITIONER'S REQUEST TO CHARGE WHICH WAS REFUSED.

In connection with the Petitioner's defense of insanity, the Petitioner requested a charge which is set forth on page 36 of his brief in support of the application for petition of a writ of certiorari. Respondent submits that the fact that the trial court did not give this charge does not constitute a reason for the granting of a petition for a writ of certiorari, since the court's charge as a whole embodied the various principles which are contained in that request to charge, and the mere fact that the court does not charge exactly as requested is not grounds for a new trial, especially when the court's charge as a whole adequately embodies those principles. Due process has not been offended in this matter. (See, Appendix A, which is the trial court's instructions during the guilt and innocence phase of the trial).

G. A STATE EVIDENTIARY PRACTICE WHICH PERMITS COUNSEL AT THE TRIAL JUDGE'S DISCRETION TO READ LAW TO THE COURT DOES NOT DENY AN ACCUSED DUE PROCESS OR HIS RIGHT TO A FAIR TRIAL.

Petitioner alleges that his right to a fair trial was abridged when the prosecuting attorney was permitted to read an excerpt from an appellate decision to the trial judge during the guilt and innocence and sentencing phase of the trial. First, it should be noted that there was no objection to this matter. Next, the language which the district attorney used which appears in an appellate decision is minimal to say the least. The Supreme Court of Georgia in analyzing this matter examined the district attorney's closing argument on sentencing as a whole, rather than viewing it in isolation and out of context with the overall argument. In fact, the complained of quote is as follows:

> "Let the stern response go out from the jury box, that who so sheds man's blood so shall his blood be shed." (T. 575).

This contention clearly fails to raise any matter of constitutional magnitude for scrutiny by this Court.

H. MATTERS RAISED FOR THE FIRST TIME PRESENT NOTHING FOR REVIEW.

Petitioner Godfrey seeks to have his application for certiorari granted on the basis that the Georgia death penalty statutory scheme is unconstitutional because it does not provide for the jury to sentence a defendant to life without the possibility of parole. This issue, however, was never presented to the trial court, or to the Supreme Court of Georgia.

Under Georgia procedure issues raised on appeal must have first been presented to the trial court for its consideration before that same matter will be reviewed on appeal. See, Strozier v. State, 231 Ga. 140, 141, 186 S.E.2d 145 (1973); Watson v. State, 227 Ga. 698, 182 S.E.2d 446 (1971).

This same principle has likewise been applied by this Court. United States v. Nobles, 422 U.S. 225 (1975); United States v. Vuitch, 402 U.S. 62 (1971); Stembridge v. Georgia, 343 U.S. 541 (1952). Due process contentions not argued in state courts are not properly presented for review by this Court. See, Moore v. Illinois, 408 U.S. 786 (1976).

For this additional reason the application for certiorari should be denied.

CONCLUSION

This Court should refuse to grant a writ of certiorari because no sufficient reasons for review have been set forth by Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, Attorney of Record for Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served true and correct copies of the Brief for Respondent in Opposition upon the Petitioner's attorney by depositing a copy of same in the United States mail, with proper address and adequate postage attached to:

Mr. J. Calloway Holmes, Jr.
Stewart and Holmes
P. O. Box 63
Cedartown, Georgia 30125

Mr. Gerry E. Holmes
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This 25th day of July, 1979.

JOHN C. WALDEN

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CHARGE TO THE JURY

BY - JUDGE WINN

Ladies and gentlemen of the jury, you've been trying the case of the State versus Robert Franklin Godfrey. This case was brought into this court by the returning of a special presentment by the Grand Jury of Polk County charging the accused with the offense of murder in count one, and murder in court two, aggravated assault in count three. It alleges in substance in count one that on September the 20th,1977 in this county he did unlawfully with malice aforethought and while making an assault upon the person of Mildred Godfrey with a deadly weapon, the same being a shotgun, caused the death of the said Mildred Godfrey by shooting her with said shotgun. Count two alleges in substance that on the same date in this county he did with malice aforethought and while making an assault upon the person Chessie C. Wilkerson with a deadly weapon, the same being a shotgun, caused the death of Chessie C. Wilkerson by shooting her with the said shotgun. Count three alleges in substance that on the same date in this county he did make an assault upon the person of Tracey Godfrey with intent to murder the said Tracey Godfrey and did then and there intentionally cause physical harm to Tracey Godfrey by striking her about the head with a shotgun-rifle barrel and blunt object.

N1.100

To this presentment, which I have read to you in substance, the defendant has entered his plea of not guilty and that forms the issue which you are sworn to try. The presentment and the plea will be out with you. You may and should refer to them as often as you see fit to determine the issues involved. They are not evidence and not to be considered by you as evidence.

You are the judges of the law and the facts in this case. The facts you obtain from the evidence produced before you, the law you take from the court as given you in charge by the court and any verdict that you may render in this case should be arrived at from the facts as you thus find them to be applying thereto the law as given you in charge by the court.

Every person is presumed innocent until proved guilty. No person shall be convicted of a crime unless each element of such crime is proved beyond a reasonable doubt. Intention is an essential element of any crime and the burden is on the State to prove such intention beyond a reasonable doubt. While the burden is not on the defendant to disprove intention nonetheless when he introduces some competent evidence of insanity which might tend to negate evil intention in the defendant at the time of the commission of the alleged crime then the burden falls upon the State to prove beyond a reasonable doubt that the defendant was sane at the time of the alleged crime and therefore had the

5.2N1.104

requisite criminal intent.

This presumption of sanity may be relied on by the State, and in most cases the State need not bear the burden of introducing evidence, and of persuasion as to the sanity of the accused in criminal proceedings, but once the affirmative defense of insanity is raised by the defendant, once the accused has come forward with some competent evidence of insanity whereby the mental capacity of the accused is placed in issue then the State in order to prove the criminal intent of the accused must present evidence to prove the sanity of the accused beyond a reasonable doubt.

A person will not ... strike that. The question of whether or not the defendant has successfully rebutted the presumption of sanity in this case is for you to decide. It is not necessary that the defendant introduce evidence of his insanity sufficient to convince you beyond all reasonable doubt but rather it is only necessary for him to introduce some competent evidence of his insanity. When he has done this the burden shifts to the State to prove his sanity beyond a reasonable doubt.

A defendant may be found to have been insane at the time of the alleged criminal act and therefore entitled to an acquittal even though he may be sane at the time of trial.

Now, a reasonable doubt means exactly what it says, it is a doubt that is founded upon reason. A reasonable doubt may grow out of the evidence or want of evidence. While the law requires the State to prove the defendant's guilt of the offense charged to your satisfaction beyond a reasonable doubt yet the law does not require the State to prove the defendant's guilt to a mathmetical or an absolute certainty. A reasonable doubt is not a vague or a conjectural doubt, it is not a fanciful doubt, it is not an imaginary doubt, neither does it mean a possibility that the defendant may be innocent, but as the court has stated to you it is a doubt that is founded upon reason.

The burden is upon the State to prove beyond a reasonable doubt the crime charged in the presentment. That burden never shifts. The defendant need not prove his innocence. If on the whole the evidence is as consistent with guilt as with innocence it is the jury's duty to acquit.

You are made by law the exclusive judges as to the credibility of the witnesses. In passing upon their credibility you may consider all the facts and circumstances of the case, the witnesses manner of testifying, their intelligence, their interest or want of interest, their means and opportunities for knowing facts to which they testify, the nature of the facts to which they testify, the probability or improbability of their

testimony, and also their personal credibility insofar as the same may legitimately appear from the trial of the case. You may also consider the relationship or the absence of relationship of the witnesses to the parties to the case.

Testimony has been given by certain witnesses who are termed experts. While in cases such as the one being tried the law receives the evidence of persons expert in certain lines as to their opinions derived from their knowledge of particular matters. The ultimate weight which is given to the testimony of expert witnesses is a question to be determined by you. In other words the testimony of an expert like that of any other witness is to be received by you and given such weight as you think it is properly entitled to but you are not bound or concluded by the testimony of any witness expert or otherwise.

The law makes it your duty to reconcile conflicting evidence, if there be such evidence in this case, so as to make all the witnesses speak the truth and perjury be imputed to none of them. But if there be any evidence in this case in such irreconcilable conflict that this cannot be done it would be your duty to believe that testimony which is most reasonable and most credible to you under all the circumstances and the evidence in this case.

The admission of gruesome photographs against the defendant were not intended to inflame your minds. They are not in the record for that purpose because the defendant is entitled to your cool and calm and free deliberations. You should lay aside any passion or prejudice against the defendant by reason of any exhibition that may appear on the photographs.

In respect to evidence, direct evidence points immediately or directly to the question in issue while indirect or circumstantial evidence tends to establish the issue by proof of various facts and circumstances sustaining by their consistency the hypothesis claimed. Before you would be authorized to convict on circumstantial evidence alone the proven facts must not only be consistent with the hypothesis of the guilt of the accused but must exclude every other reasonable hypothesis save that of the guilt of the accused.

In criminal cases the defendant is permitted to introduce evidence as to his or her general good character. Good character may of itself be sufficient to justify a reasonable doubt as to the guilt of the accused or considered in connection with other evidence in the case it may be sufficient to create such doubt. Nevertheless if you should believe beyond a reasonable doubt that the defendant is guilty as charged in the presentment you would be authorized to convict notwithstanding the evidence of

general good character. Good character like any other fact tending to establish innocence is a substantive fact and should be so regarded by you along with the other evidence in the case in determining whether the defendant is guilty or not guilty.

The object of all legal investigations is the discovery of the truth. Rules of evidence are framed with a view to this prominent end seeking always for pure sources and the highest evidence. A crime is a violation of a statute of this state in which there shall be a union or joint operation of acts or omission to act and intention or criminal negligence. The act of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the tryor of facts, that is you the jury, may find such intention upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted. Every person is presumed to be of sound mind and discretion but the presumption may be rebutted.

The defendant has put in evidence which indicates he was insane at the time of the crime. If this creates in your mind

a reasonable doubt as to his sanity the legal presumption of sanity is rebutted and the prosecution must remove that doubt and prove the sanity of the defendant beyond a reasonable doubt.

Code Section 26-1101 defines murder. It privides in Sub Section (A), a person commits murder when he unlawfully and with malice aforethought, either expressed or implied, causes the daath of another human being. Expressed malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart. Sub Section (B) provides, a person also commits the crime of murder when in the commission of a felony he causes the death of another human being irrespective of malice.

A felony means a crime punishable by death or by imprisonment for life or by imprisonment for more than twelve months. Code Section 26-1302 defines aggravated assault. A person commits aggravated assault when he assaults (a) with intent to murder, to rape or to rob or (B) with a deadly weapon. So you'll understand the meaning of assault Code Section 26-1301 defines simple assault, a person commits simple assault when he either (a) attempts to commit a violent injury to the person

of another, or (b) commits an act which places another in reasonable apprehension of immediately receiving a violent injury.

Count three of the presentment charges the defendant with aggravated assault against Tracey Godfrey;on the issue of aggravated assault you may be entitled to consider whether or not the defendant is guilty of the lesser offense of simple battery. Simple battery is defined in Georgia Code, Title 26-1304 as follows. A person commits simple battery when he either (a) intentionally makes physical contact of an insulting or provoking nature with the person of another, or (b) intentionally causes physical harm to another.

Code Section 26-702 provides, a person shall not be found guilty of a crime if at the time of the act, omission or negligence constituting the crime such persor did not have mental capacity to distinguish between right and wrong in relation to such act, omission, or negligence.

In order to be punishable by law a person must have sufficient memory, intelligence, reason, and will to enable him to distinguish between right and wrong in regard to the particular act about to be done, to know and understand that it will be wrong and that he will deserve punishment by committing

it. In order to constitute a crime a man must have intelligence and capacity enough to have a criminal intent and purpose, and if his reasoning and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if through the overwhelming power of mental disease his intelligent power is for the time obliterated he is not a responsible moral agent and is not punishable for criminal acts.

Insanity may be only a temporary malady. If the accused at the time of the act with the commission of which he is presently charged did not have reason sufficient to distinguish between right and wrong with reference to that act he would not be criminally responsible and it would make no difference insofar as the law is concerned whether his condition of insanity at the time of the commission of the act was of a temporary nature or permanent in character. The test of criminal responsibility being the condition of his mind at the time of the commission of the act.

In determining the issue of sanity or insanity the jury may consider the acts and mental condition as revealed by the evidence of the accused before and after the commission of the alleged offense, if any, and the declarations, if any, of the defendant made at the time of the alleged offense, or reasonably close thereto, as proof of his mental condition at the time of

such alleged crime. Opinion testimony relative to sanity or insanity, either lay or expert, is by no means conclusive upon this issue and is peculiarly dependent upon the facts or evidence supporting such opinion or opinions. The weight to be given such opinion is solely for the determination of you the jury.

If you should find that the defendant did not have reason sufficient to distinguish between right and wrong,under the instructions which I have given you, at the time of the commission of such alleged offense that would be an end to your deliberations and you would stop at that point as your verdict would be "we the jury find the defendant not guilty by reason of insanity".

The law in this state provides that in all criminal cases wherein an accused shall contend that he was insane or mentally incompetent under the law at the time the act charged against him was committed that in the case of acquittal on such contention the jury shall specify in their verdict that the accused was acquitted because of mental irresponsibility or insanity at the time of the commission of the act.

If, however, from a consideration of the evidence you determine beyond a reasonable doubt that at the time and place

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of the occasions under investigation in this trial that the defendant was sane and thus responsible in such event you would proceed to consider the other portions of the charge that I have given you, or will give you, in this case.

After considering all of the case under the charge of the court if you have a reasonable doubt as to the guilt of the accused it is your duty to give him the benefit of that doubt and acquit him and in that event the form of your verdict would be "we the jury find the defendant not guilty". If you find the defendant not guilty by reason of insanity the form of that verdict is "we the jury find the defendant not guilty by reason of insanity". If you find the defendant guilty the form of that verdict is "we the jury find the defendant guilty". You would need to reach a verdict as to each count. The three verdict forms which I have just given you would be the possible verdicts in count one and count two, the two murder counts, that is not guilty, not guilty by reason of insanity, or guilty.

As to count three you would have four possible verdicts, not guilty, not guilty by reason of insanity, guilty, which would be guilty of aggravated assault, or guilty of the lesser included offense in that count which is guilty of simple battery. And I will have each of these verdict forms prepared, they will be typed and sent out with you. The manner in which they are

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typed or written out would have nothing to do with what your verdict should or should not be. That is entirely up to you. Your verdict as to each count must be unanimous, that is it must be agreed to by all twelve of you, when you have reached a verdict as to each count and your foreman or forelady has signed the indictment... signed the verdict which the twelve of you agree upon notify your bailiff who will in turn notify the court and you will be allowed to publish it in open court. You may retire to the jury room.

(The jury leaves the box)

MR. HOLMES: Your Honor, is it now appropriate if I just make some objections in the record.

THE COURT: Yes.

MR. HOLMES: I would have objections to the court's charge on several bases starting with the last request for charge which is defendant's request for charge number twenty eight which was submitted this morning requesting the court to charge Georgia Code Annotated, Section 27-1503, part (a) and (b) as amended and found in the 1977 supplement which has to do with the disposition of the prisoner...

THE COURT: ... Wait until they get in and get seated. I wish you'd wait and open these doors when I direct you to Mr. Sheriff. If you'll close them now and let me finish this case.

(The sheriff closes the doors)